Filed 2/26/19 P. v. Gomez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN SANCHEZ GOMEZ, Defendant and Appellant.	F075828 (Super. Ct. No. F13906616) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Peña, J. and DeSantos, J.

Adrian Sanchez Gomez (defendant) stands convicted, following a jury trial, of oral copulation of a person incapable of giving consent. (Pen. Code, former § 288a, subd. (g).)[1] Sentenced to prison for eight years, he now appeals, contending the evidence is insufficient to support his conviction. We affirm.

FACTS

I

PROSECUTION EVIDENCE

Background

B. was 28 years old at the time of trial in 2017.[2] According to B.'s mother, C., B. was diagnosed with quadriplegia cerebral palsy when she was about three years old. She was unable to talk fluently, and could not move most of her body.[3] She had about 70 percent mobility in her right hand, but almost none in her left. She was unable to walk, and used a wheelchair. She could not get in and out of her wheelchair by herself. She had no control over her bodily functions, and so wore diapers. She was able to let someone know when she needed to be changed.

B. enjoyed playing games on an iPad, texting with her best friend, coloring, and doing puzzles, although she was unable to put together puzzles with more than 100 pieces. She went to elementary school, middle school, high school, and university on her level. She was always in special education. She could count (possibly as high as 100), but was unable to do any mathematics other than simple addition. She could sometimes

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1 All statutory references are to the Penal Code.

Effective January 1, 2019, section 288a was renumbered section 287. (Stats. 2018, ch. 423, § 49.) For purposes of clarity and readability, we refer throughout this opinion to section 288a as it existed prior to being renumbered.

2 For the sake of privacy, we refer to some persons by their first initial. No disrespect is intended.

3 B.'s condition was slightly worse in 2017 than it was in 2012.

identify coins, but was unable to count money. Her memory was fine. She could read at first- or second-grade level. She could write her name and some words, but her written sentences were simple and did not have correct punctuation or grammar.

In 2012, as in 2017, B. had a lot of dolls and bears. Her wall was filled with stuffed animals and princesses. Her room was like that of a little girl. B. thought she was a princess. Spanish was B.'s first language, but she also spoke English. She spoke both languages well, although her speech was often unclear, especially if she was nervous. People who spent a lot of time with her usually could understand what she was saying better than people who did not know her.

C. had talked to B. about sex, but B. did not understand like other girls. When C. asked B. what sex was to her, B. responded, "having babies." Prior to 2012, C. talked to B. about puberty and sex, including what it was and how everything worked. C. did that to try to prevent things from happening to B.

B. had been a client of Central Valley Regional Center (CVRC) since the age of three and had been attending a day program at ARC since 2011.[4] Mary Stubblefield had been her case manager and had interacted with her almost daily for six to eight months as of October 2012. According to Stubblefield, B. was not in a program that would have enabled her to get a job and be out in the community, as she would not have been capable. In 2012, her abilities were such that she was in "a 1 to 4 ratio," meaning there was one staff member for every four people in her range of ability. The only level lower was a one to three ratio. In the ARC program, she made things, did art, and participated in activities designed to increase her gross or fine motor skills. Most of what she did was at about a kindergarten level.

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[4] "ARC" once stood for Association for Retarded Citizens. As of trial, the organization was named the ARC.

Dr. Stanley Littleworth, who had a Ph.D. in clinical psychology and who worked with CVRC, conducted a psychological evaluation of B. early in 2013. He observed B. to be very dependent on her mother. Although B. spoke in short sentences, her speech was logical, goal-directed, and free of delusional content.

Littlefield gave B. an IQ test pursuant to the Wechsler Adult Intelligence Scale. B. scored in the middle range of mild intellectual disability. The mean score on the test is 100, with the average range being 15 points either way. A score below 70 falls into the intellectually disabled range. B.'s score was 63. Her prorated full scale IQ was 53.[5] Littlefield estimated B.'s mental age, including her social and emotional functioning, was in the eight- to 12-year-old range. Academically, she functioned at about the second grade level. Littlefield concluded she was at an increased risk for being taken advantage of sexually.

The Charged Offense

In 2012, C. was in a dating relationship with defendant's brother. The two families had known each other since 2004 or 2005, when defendant was in high school, and often socialized together at each other's homes. Defendant frequently came to C.'s house. Sometimes he and B. spent time in B.'s bedroom, alone. C. checked on them frequently, and never saw any physical contact between them other than holding hands. B. would say defendant was her best friend. C. allowed defendant to stay overnight at her house on one or two occasions. One time, defendant slept on the couch. The second, he slept in B.'s bed, having fallen asleep in her room. C. told him he needed to leave, which he did.

B. testified at trial that defendant used to come to her house all the time, and they were friends for many years. They would play video games and watch movies together.

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[5] Littlefield was unable to use the full scale IQ because B.'s physical disabilities prevented him from administering the subtests that require manipulation with the hands.

B. liked cartoon movies and movies about dogs. Sometimes they would be in the living room and sometimes in B.'s bedroom. They held hands a lot. Defendant was B.'s best friend. B. and defendant were sort of boyfriend and girlfriend. They talked to each other like boyfriend and girlfriend. Defendant told B. that she was his girlfriend.

B. and defendant were no longer friends as of the time of trial. Something happened to make them not be friends. When they were in B.'s bedroom, defendant would kiss B.'s mouth and "[b]oobs." When defendant kissed B.'s chest, B. would not have on a shirt. Defendant kissed B. more than once. He put his mouth on her "boobs" "[t]oo much." He also touched her crotch with his hands more than once. He touched her skin under her diaper. It felt "[b]ad." B. told him to stop, but he did not. Defendant also had B. touch his mouth with her mouth. One time, he pulled off his jeans and pulled out his "private part." He put it in her mouth and asked her to lick and suck it, which she did. B. was in her bed when this happened. Defendant had put her in the bed. Afterward, he said he loved her. He also told her not to tell anyone. This made her mad, because she wanted to tell her mother and sister.

B. told Stubblefield what happened.[6] Afterward, B. did not see defendant again. It made B. a little mad, because she did not know why she did not see him. B. still wanted to see defendant, although she just wanted to be best friends again and not boyfriend and girlfriend.

Fresno Police Officer Gomez arranged for, and viewed, a forensic interview of B. He subsequently interviewed defendant.[7] Defendant stated he was 27 years old, and B. was 24. Defendant identified B. as his girlfriend of approximately two years. He said B. could not walk and was mentally challenged, although she could rationalize well. He did

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[6] On October 29, 2012, B. indicated to Stubblefield that she had been touched sexually. As required by the ARC, Stubblefield reported the matter to the police.

[7] A video recording of the interview was played for the jury.

not know the level at which B. performed, but felt she was intelligent and understood a lot of things even though it might seem as if she did not understand.

Defendant related that he and B. would get together like regular boyfriend and girlfriend. They would watch movies together. He would put her to bed and lie there until a movie was over, then he would leave. B. was very intimate and always wanted to have his hand or to have a hand over him. Things had been becoming more intimate for two years. Defendant denied having sex with B., but admitted caressing her breasts. He explained this eventually led to him caressing her vaginal area. This did not happen every time they were together, but over the period of two years, they got closer "and hormones took over." Defendant related that B. performed oral sex on him two or three times, although his penis never went inside her mouth. He "held [himself] back" from penetrating her mouth and she only licked him, because, given her condition, he did not want to choke her. In addition, she had a biting reflex. Also, defendant thought it might be wrong. Although what they did was consensual, he thought he was kind of taking advantage of her. He denied forcing B.; if she felt bad, she could have told him. She told him that she was afraid her mother would catch them. Defendant felt a stranger easily could take advantage of B. He felt she possibly could be taken advantage of by someone who knew her, even him.

Defendant did not think B. acted like a 24-year-old. In some ways, she acted younger than a 14-year-old. For instance, she had a lot of teddy bears and still watched cartoons. Defendant related that B. could make decisions on her own. He did not think she was able to consent to sexual intercourse or other sexual acts. During the occasion on which he put his hand down her diaper and touched her vagina, he concluded "she was into it as well," as she moaned. Although he did not believe she was capable of giving consent to a stranger, he believed she could give consent to him because he knew her so well. When he talked to her, she acted like she was 14 or 15 years old. He realized what he did was wrong because of B.'s conditions. He answered affirmatively when Officer

Gomez asked if he believed the evidence in the case was strong and pointed to defendant believing B. was unable to provide any type of consent.

II

DEFENSE EVIDENCE

Defendant testified that he first met B. in about 2005, when C. and defendant's brother were boyfriend and girlfriend. After that, he saw B. when the families got together. He continued going to B.'s house even after his brother moved out in 2007. He and B. were just friends during this time and through 2008.

In 2009, defendant started spending more time alone with B., who now had her own room instead of sharing with her sister. While in B.'s bedroom, defendant and B. would talk about everyday things, watch movies, and play video games. Defendant would lie down on the bed, and B. would sit next to him and massage his back while they watched a movie. They would also hold hands, both when alone and in front of their families. B. had had a boyfriend in 2006. She knew him through school. He was also in a wheelchair. She had held hands with him. She also held hands with her mother and sister, and with defendant's brother.

The more defendant got to know B., the less he saw her as having a condition. Around the end of 2010, defendant slept overnight with her for the first time. They got to hold each other a lot more than in the past, and it moved from caressing to foreplay and kissing. They kissed on the lips, and defendant kissed B.'s neck and breasts and hands. His actions seemed to give her pleasure, as she moaned. As they became more aroused, defendant masturbated B.'s vaginal area until she climaxed. At no time did she tell him to stop. They kept caressing, then fell asleep.

The last time defendant saw B. prior to trial was around October 28, 2012. Between around Christmas 2010 and that date, he slept over with her about 15 times, with C.'s permission. Nobody regularly opened the door to check on them. They kept the changed nature of their relationship to themselves, because defendant was brought up

to be conservative about such things. He was also concerned people might think their relationship was wrong or would judge him. He told B. not to tell anyone, because "it looked bad as it sounded" for him, an able-bodied person, to be sleeping with someone like her. Defendant was concerned about how other people saw the relationship, and he also felt some conflict. He was worried they might be separated, even though B. was of an adult age. Defendant was happy, and perceived B. to be happy, too. When they talked about their boyfriend-girlfriend relationship, B. said that with defendant, she got to experience more in a relationship than she did when she had her previous boyfriend.

Defendant believed B. was able to consent to their sexual conduct. She invited it willingly and never told him to stop. When he asked if she was interested in trying oral sex, she responded positively. Because of defendant's fear B. would bite him due to her bite reflex (she would bite anything introduced into her mouth), he never placed his penis in her mouth. The contact consisted only of licking.

Defendant did not feel as if he was taking advantage of B. When he answered Officer Gomez's question on the subject affirmatively, he did so because Officer Gomez put it in the context of taking advantage if defendant was a stranger to B. Defendant told Officer Gomez that B. could not give consent, because Officer Gomez had put it in terms of the person being a relative. Defendant believed B. could consent with respect to him, but maybe not with respect to another person.

Sometime before the two became sexually intimate, defendant had conversations with B. about what sex was. He told her how people had sex and how babies are made. These conversations were in keeping with defendant's habit of clarifying things B. did not understand. Before these conversations, B. did not appear to know about sex.

DISCUSSION

Section 288a, subdivision (g) proscribes commission of an act of oral copulation where "the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be

known to the person committing the act . . . ." For purposes of this statute, "consent" means "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (§ 261.6.) A current dating relationship is not sufficient, of itself, to constitute consent. (*Ibid*.) If the person with whom the defendant engaged in oral copulation was incapable of giving legal consent and this was known or reasonably should have been known to the defendant, the act is a crime even if the victim purported to consent. (*People v. Thompson* (2006) 142 Cal.App.4th 1426, 1429 (*Thompson*).)

Defendant contends insufficient evidence was presented at trial to prove the elements of the offense, specifically, that B. was incapable of consenting. He presents an impassioned plea that we not uphold a conclusion by the jury that "condemns [B.] to a life where she can never enjoy a sexual relationship with anyone, or at least enjoy such a relationship without her partner risking a felony conviction." Whatever the future holds for B., the only issue properly before us is whether, from all the evidence presented at trial, any reasonable juror could have concluded B. was, at the time she licked defendant's penis, incapable of giving legal consent. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* at p. 578.) "We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) An appellate court must "presume in support of the judgment the existence of

every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "If the circumstances reasonably justify the [trier of fact's] findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Instead, reversal is warranted only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

As defendant's jury was instructed, "[A] person is prevent[ed] from legally consenting if he or she is unable to understand the act, its nature and possible consequences." (CALCRIM No. 1019; see *People v. Griffin* (1897) 117 Cal. 583, 585.) The question whether B. possessed the mental capacity sufficient to give legal consent was one of fact for the jury. (*People v. Griffin*, *supra*, 117 Cal. at p. 585, overruled on another ground in *People v. Hernandez* (1964) 61 Cal.2d 529, 536; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1413 (*Miranda*).) No expert testimony or particular type of clinical diagnosis was required, as lay jurors are able to assess the extent of a victim's mental disability. (*Miranda*, *supra*, at pp. 1413-1414; *People v. Lewis* (1977) 75 Cal.App.3d 513, 519.)

The evidence at trial showed B. was always enrolled in special education; could not perform mathematical functions except for simple addition; could not count money; read at a first- or second-grade level; could write only her name, some words, and simple sentences; was unable to do puzzles more complicated than those having 100 pieces; had a room and tastes in movies like that of a little girl; and would have been incapable of

having a job and being out in the community. To her, sex meant having babies. Her prorated full-scale IQ was 53, and her mental age was in the range of an eight- to 12-year old.

The foregoing evidence clearly was sufficient to support a reasonable conclusion that, at the time of the charged act of oral copulation, B. was legally incapable of consenting thereto due to a developmental disability. In light of defendant's longstanding relationship with her, it was also manifestly sufficient to support a rational conclusion defendant knew or reasonably should have known this fact. (See, e.g., *Miranda*, *supra*, 199 Cal.App.4th at pp. 1413-1416; *Thompson*, *supra*, 142 Cal.App.4th at pp. 1431-1432, 1436-1437; see also *People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1616, 1623.)

Defendant seeks to contrast *Miranda* and *Thompson* on the ground that the fact pattern in each of those cases shows a sexual assault apart from the issue of the victim's capacity to consent, whereas in the present case, no reasonable person would conclude B. was sexually assaulted were it not for her disability. The fact an act may have been consensual if both parties had the capacity legally to consent is irrelevant to the question before us, however. As the *Thompson* court observed, "[I]t is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people." (*Thompson*, *supra*, 142 Cal.App.4th at p. 1429.) Also irrelevant is the question of B.'s capacity *ever* to consent, as we are concerned with her capacity at the time the charged act was committed. (*Id*. at p. 1440.)

Defendant points to a consultation report prepared by Dr. Harold Seymour, a clinical and forensic psychologist, on October 30, 2013. In part, Seymour related that B. reported defendant brought up the issue of the two of them possibly engaging in intercourse, and B. recognized what that meant and the implications and consistently told defendant no. Seymour found this "clearly" demonstrated a capacity to consent or not consent.

Seymour did not testify at trial and his report was not admitted into evidence. Accordingly, it does not detract from our conclusion the trial evidence was sufficient to support the jury's verdict. Moreover, the fact B. may have equated sex with having babies and said no to intercourse, does not mean she was able to understand the nature and consequences of the act defendant was convicted of performing. (See *Thompson*, *supra*, 142 Cal.App.4th at pp. 1436-1437.)

DISPOSITION

The judgment is affirmed.